

FEB 07 2008

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSE MARIANO-SANTOS,

Petitioner - Appellant,

v.

SHARON BLACKETTER,  
Superintendent, Eastern Oregon  
Correctional Institution,

Respondent - Appellee.

No. 07-35368

D.C. No. CV-05-00595-KI

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the District of Oregon  
Garr M. King, District Judge, Presiding

Submitted February 5, 2008  
Portland, Oregon

Before: RYMER, T.G. NELSON, and PAEZ, Circuit Judges.

Jose Mariano-Santos appeals the district court's denial for his petition of a writ of habeas corpus. We affirm.

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<sup>\*</sup> This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> The panel finds this case suitable for decision without oral argument argument. *See* Fed. R. App. P. 34 (a) (2).

We disagree that the state postconviction court incorrectly applied a preponderance of the evidence standard such that our review should be de novo. The court merely (and not improperly) applied this standard to the underlying facts, not to its application of *Strickland v. Washington*, 466 U.S. 668 (1984). *Holland v. Jackson*, 542 U.S. 649 (2004); *Davis v. Woodford*, 384 F.3d 628, 638 (9th Cir. 2004).

Nor does the record indicate that Mariano-Santos's guilty plea was not knowing, voluntary, and intelligent. The state court's factual determinations are presumed correct absent rebuttal by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Mariano-Santos has made no such showing here. His plea indicates that he pointed a firearm at, and threatened to kill, the victim; that his attorney explained the maximum penalties; and that he did not dispute the factual basis for the plea. In any event, even assuming deficient performance, there is no substantial evidence in the record that Mariano-Santos would not have pled guilty regardless. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (holding that a petitioner must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.").

AFFIRMED.